PREME COURT. U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1037

ELMER D. RUSSELL,
Petitioner,

vs.

MUTUAL OF OMAHA INSURANCE COMPANY,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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MUTUAL OF OMAHA INSURANCE COMPANY,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Elmer D. Russell, petitioner, prays that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Tenth Circuit on the 30th day of September, 1968, reversing the judgment of the United States District Court for the District of Kansas which awarded petitioner a judgment against the respond-

ent for $20,000.00 together with statutory interest under the law of Kansas from March 6, 1963. (R. 68-71).[1]

References to the pages of the record will be preceded by the letter "R." References to pages of the Appendix will be preceded by the letter "A."

OPINIONS DELIVERED IN THE COURTS BELOW

The Memorandum Decision of the United States District Court for the District of Kansas was entered and filed on April 6, 1966, but is not reported in any official or unofficial reports. However, it is appended hereto. The opinion of the United States Court of Appeals for the Tenth Circuit filed September 30, 1968, is reported in the Federal Reporter, second series and is cited as 402 F. 2d 339. The opinion is appended hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) and Rule 19, 1(b), Rules of the Supreme Court of the United States, adopted June 12, 1967, effective October 2, 1967, and particularly that part of the aforementioned rule indicating that this Court will seriously consider granting certiorari in a case where a Court of Appeals has decided an important state question in a way in conflict with the applicable state or federal law or where it has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

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1. Respondent, defendant in the trial court, appealed from the trial court's judgment. That appeal was designated No. 9169 in the Court of Appeals. Petitioner here, plaintiff in the trial court, cross-appealed from so much of the judgment as fixed the amount of the recovery at $20,000.00 instead of $90,000.00 and from the trial court's ruling denying him an attorney's fee. That appeal was designated No. 9182 in the Court of Appeals. The two appeals were consolidated and only one argument was had.

The judgment of the United States Court of Appeals for the Tenth Circuit hereby sought to be reviewed was filed on September 30, 1968.

Petitioner, appellee-cross-appellant in the Court of Appeals, filed his petition for rehearing on the 19th day of October, 1968. The petition was denied by the Court of Appeals on the 9th day of December, 1968. On December 27, 1968, the mandate of the Court of Appeals was stayed for a period of 30 days as provided by Rule 31(b) of the rules of said Court and the stay was extended for an additional 15 days by order of the Court of Appeals entered on the 27th day of January, 1969.

QUESTIONS PRESENTED FOR REVIEW

1. When the outcome of a diversity case depends upon the determination of an important question[2] of state law not previously decided by the state and the determination of this question is made by the trial judge, a distinguished member of the bar of that state, did the United States Court of Appeals exceed permissible limits of appellate review, in reversing the trial court so as to compel this Court to exercise its supervisory powers over the Appellate Court's action?

2. In the absence of a showing that the trial court's determination of a controlling question of state law was

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2. The importance of the question involved is evident from the manner in which the Court of Appeals framed it in the opening paragraph of its opinion:

"Does the speed of the modern jet age and the restless, irrepressible, increased tempo of all who are in its vortex impose on a flight insurer the obligation toward prospective policy buyers of explaining the distinctive differences of the several available coverages? Does the insurer's attractive sales booth, neon signs heralding the need for and availability of 'flight insurance,' and the other catchy advertising come-ons carry the inevitable message to scurrying people on the move the notion that the coverage is for the traveler's intended round trip rather than for a definitive period of time?" (A. 2).

clearly erroneous, was the action of the United States Court of Appeals in reversing the trial court's judgment such a departure from accepted and usual judicial proceedings as to compel this Court to exercise its supervisory powers to prevent such an unwarranted departure?

3. In reversing the judgment of the United States District Court for the District of Kansas in favor of the petitioner, which rested on the trial court's ruling that under Kansas law the seller of air travel insurance in a commercial airport owed a duty to prospective purchasers to explain the distinctive features of coverage, did the United States Court of Appeals decide the question in a way in conflict with Kansas law?

STATUTE INVOLVED

Act of June 25, 1948, c. 646, 62 Stat. 944. *State laws as rules of decision.*

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

Because of the novel character of the question involved and the peculiar circumstances under which respondent sold petitioner the insurance policy in question for his wife, we must respectfully impose upon the Court by setting out a rather detailed statement of the facts.

Summary of Proceedings Below

Petitioner, Elmer D. Russell, commenced an action in the United States District Court for the District of Kansas to recover on an insurance policy issued by respondent for

the accidental death of his wife Bertha who was killed when an incoming Continental Airlines plane on which she was a passenger crashed at the Kansas City Municipal Airport at approximately 10:45 p.m. on the night of January 29, 1963. Petitioner sought recovery on one of two theories: Reformation of the contract or, a construction of the contract so as to extend the period of coverage to the time of the insured's death. (R. 23).

The trial Court reformed the policy sold to petitioner's wife so as to extend coverage to the time of the fatal crash and entered judgment for petitioner against the respondent for the sum of $20,000.00, the principal sum provided for in the policy sold to Mrs. Russell. (R. 64). Respondent appealed the judgment (Court of Appeals No. 9169) and petitioner cross-appealed (Court of Appeals No. 9182), from the portion of the judgment fixing the amount of recovery at $20,000.00 instead of $90,000.00, which was the amount of insurance it was stipulated by the parties the premium would have purchased if the company had sold petitioner's wife air travel insurance rather than the general accident insurance (R. 472), and from the ruling of the trial court denying his application for attorney fees. (R. 81).

The Court of Appeals reversed on the ground that the insurer had no duty to explain to the assured the significant differences in the types of coverage it offered for sale regardless of the circumstances of the transaction. The appellate court's judgment of reversal rendered moot the cross appeal. (A. 13).

Statement of Facts

Petitioner Elmer D. Russell and his wife Bertha were residents of Kansas City, Kansas. On January 24, 1963, Mrs. Russell received word that a brother had died in Lubbock, Texas, and on the following day she and her husband and son Richard went to the Kansas City, Mis-

souri, Municipal Airport for the purpose of putting Mrs. Russell and Richard on a Continental Airlines flight to Lubbock. Both Mrs. Russell and her son bought round trip tickets but the return portion was "left open." The reason for this was that the time and date on which the funeral of Mrs. Russell's deceased brother was to be held had not been set and in fact it was not determined until Monday, January 28th, that the funeral was to be held on Tuesday, January 29th. Prior to receiving that information, there had been no tentative or suggested date as to when the funeral was to be held.

Mrs. Russell had never flown before (R. 245, 256) and was nervous and upset over the loss of her brother. (R. 265). In addition the Russells had to hurry to get to the airport and arrange to board the plane which left shortly after their arrival. (R. 246-248).

Reverend Russell had made four air trips prior to January 25, 1964, and on each of these occasions he had purchased flight insurance to protect him on these trips and the insurance which he purchased covered him for the duration of the trip, however long it would take. (R. 256).

After Mrs. Russell and Richard Russell had obtained their tickets from the airlines ticket counter, Reverend Russell directed his wife and son to a nearby insurance vending machine intending to purchase round trip air travel insurance. However, he didn't have the proper change and so they went to a nearby insurance sales booth. (R. 250-251).

The position of the airline ticket counter in relation to the insurance vending machine and the insurance sales booth where insurance was sold to Mrs. Russell has, as the trial court found, relevance with respect to the offer of insurance which respondent made to the traveling public

and the intent of the petitioner with respect to the coverage he expected to get for his wife. The terminal building is entered from the east side. (R. 260). The insurance vending booth is passed on the way to the Continental Airlines ticket counter. (Pl. Ex. 2; R. 263, 491) shows the respondent's air travel insurance booth viewed from the east. (R. 260). (Pl. Ex. 3; R. 263, 492) is also a view of the same booth as one views it from the east going west toward the Continental Airlines ticket counter which can be seen in the picture. (R. 260; 490). (Pl. Ex. 5; R. 263, 493) is a view of the insurance booth looking from the south to the north and shows respondent's insurance machine in the picture. (Pl. Ex. 8; R. 263, 494) is another view of respondent's insurance vending machine in the same position as in the previous exhibit. (R. 261). The conditions depicted in the pictures prevailed at the time of the transaction in question. (R. 262). The vending machine was perhaps 25 to 30 feet from the Continental Airlines ticket counter and appellant's insurance booth was perhaps about the same distance east of the vending machine. (R. 264).

The Insurance Sale

As the Russells approached the insurance booth the attendant asked if she could serve them whereupon Reverend Russell replied that he wanted flight insurance for his wife who was going to Lubbock, Texas and return. (R. 251, 295). Richard at the same time laid the two airline tickets on the insurance counter after removing them from the envelope. The attendant then asked how much insurance was wanted and Mrs. Russell asked what was the least amount they could buy whereupon the attendant replied, "$20,000.00." The Russells indicated that this was the amount they wanted. (R. 297). The attendant immediately began writing up the policy and in the

process asked the Russells how long Mrs. Russell would be gone or when she would return. (R. 252). Whereupon Reverend Russell's wife looked at him and in a quizzical voice asked, "Three days, do you think we can make it back in three days?" to which Reverend Russell replied, "You better allow yourself more than that—at least allow yourself another day." This was purely a conversation between appellee and his wife. (R. 253). The Russells made no direct answer to the attendant as to the duration of Mrs. Russell's trip although it is possible she heard the conversation between them. (R. 253, 285). The attendant never explained to the Russells why she had asked how long Mrs. Russell would be gone or when she would return and Reverend Russell did not know what the purpose of the question was. (R. 266).

The attendant filled out the policy, turned it around for Mrs. Russell to affix her signature to it (R. 253), and as soon as Mrs. Russell signed it, immediately took the paper back, took off and retained a part of the policy, closed and stapled it together, and handed it to Mrs. Russell. (R. 268). The policy was stapled together in two or three places. (R. 280). Reverend Russell then asked the attendant what the premium was and was informed that it was $2.25. Mrs. Russell paid the premium in change. The policy was then handed to her. (R. 270). Mrs. Russell and Richard then hurriedly departed to board the plane and in the rush Reverend Russell was hardly able to keep up with them. (R. 271).

There was no mention by respondent's attendant of the duration of coverage under the policy sold to Mrs. Russell except the previous question concerning the length of time she intended to be gone (R. 254) and the trial court found specifically that this question could not be considered as an explanation of the extent of coverage. (R. 61).

The entire transaction took only a minute or two. (R. 425, 427). The respondent's attendant never suggested that petitioner or his wife should look at the policy or study it. (R. 265). She never described the terms of the coverage to petitioner or his wife. (R. 269). Nor did she ever explain why she had asked about the duration of Mrs. Russell's trip. (R. 266). Reverend Russell did not think that the question had anything to do with the duration of the trip because he thought the insurance was good for the duration of the round trip as ticketed. (R. 313). The only time the policy was ever turned toward the Russells prior to it being stapled together was for the purpose of obtaining Mrs. Russell's signature. (R. 268).

After the policy was stapled and handed to Mrs. Russell, she handed it to petitioner and he stuck it in his pocket (R. 272) and didn't look at it until after his wife's funeral. (R. 273, 274, 316). Only one policy was furnished to the Russells. Mrs. Russell did not have a copy in her possession. (R. 276).

Although respondent sold 11 types of policies at the insurance booth in the Kansas City Municipal Airport, only two policies were sold in any number (R. 45) and those were the T-18 type policy which was the type sold to Mrs. Russell—a short term general accident policy—and the T-20 type policy which is the policy against loss in air travel or while going to or from the airport. (R. 230, Pl. Ex. 16; R. 439, 616). The trial court considered that these were the only two important types of policies involved in this case. (R. 60). The T-20 type policy is in effect until completion of the round trip or 12 months from the date of issue. (R. 230). The T-18 type policy, the general accident policy, is sold in daily units (R. 219) and remains in effect for the stated number of days up to 31. (R. 220) (Pl. Ex. 11; 281, 497).

When the T-18 type policy which respondent sold to petitioner was stapled shut, it looked the same to petitioner as the T-20 type policy, the type of policy he was familiar with. (R. 280, 281). Prior to opening the policy, after his wife's funeral, petitioner was not aware of any difference between the policy sold to his wife and those which he had previously bought at the airport. (R. 316). When petitioner bought the policy in question for his wife, it was his understanding that the policy would remain in force until his wife returned to Kansas City whenever that might occur, as long as she returned on the round trip ticket which she had purchased. (R. 133).

The trial court made a specific finding that the entire transaction was handled by petitioner for his wife (Finding No. 4, R. 62) and for the purpose of this petition we shall sometimes refer to petitioner as the purchaser of insurance although his wife was the insured.

According to respondent's booth manager, a routine sales procedure was prescribed for the attendant to follow. (R. 45). Merely asking how long the customer was going to be gone was not sufficient. If the customer said, for instance, the trip would last three days, the attendant would have to know if he was leaving on the day of the transaction and she would then count off the days and ask specifically the day of his return. Then they would tell the customer that they had two policies, "the flight" policy and the general accident policy which covered the flight with continuous coverage during the trip. (R. 445).

Respondent's booth manager explained that if a customer was leaving on the 25th of the month as Mrs. Russell was and *planned* to return on the 29th of the same month, respondent would sell her a 5-day coverage. (R. 53). If a person's trip was for four days, it wouldn't make any difference what time they came back on the fourth day because

the respondent always sells them an extra day's coverage. (R. 54-55). Mrs. Russell was sold a four-day policy.

The T-18 policy which was sold to petitioner's wife was actually being promoted by respondent at the time of the sale because it was a newer policy. (R. 148, 149). It was displayed on the booth counter so that the customer saw it first and generally the customer purchased it. (R. 150, 151).

The evidence disclosed that in the instant case no explanation was made concerning the different features of coverage of the policy offered by respondent, and the procedures outlined for respondent's attendant were not followed:

In entering judgment for the petitioner, the trial court first observed that under Kansas law reformation would be invoked where there was a mistake by one party and the other party is guilty of constructive fraud or inequitable conduct, citing Kansas cases. The Court then defined equitable fraud according to Kansas law. (A. 19). The Court found that the insurance company knew what its policies contained and knew that the prospective buyer did not know what they contained; found that respondent had knowledge that the petitioner wanted to buy insurance to protect his wife while riding on a plane but nevertheless remained silent instead of telling petitioner that he was buying a different coverage; and concluded that respondent's silence in the face of this knowledge violated a duty owed by respondent to petitioner amounting to inequitable conduct constituting constructive fraud under Kansas law for which reformation would lie. (A. 22-24).

The Court of Appeals recognized the accuracy of the legal principles relied upon by the trial court in reaching

its judgment, accepted the findings and conclusions concerning the proof in the case as stated by the trial court, but concluded that a proper application of the legal principles to the facts did not warrant the trial court's conclusion that a duty to explain existed. In reversing the trial court, the appellate court cited no authorities in support of its holding on this point.

Kansas has not decided the substantive question upon which the case turned in the lower courts, namely the duty of an insurance company to explain the distinctive differences in coverage in similarly appearing policies offered to the air traveling public, and to our knowledge the question has not been decided elsewhere.

ARGUMENT AND AUTHORITIES IN SUPPORT OF ALLOWANCE OF WRIT

Introductory Statement

The importance of the substantive question decided by the Court of Appeals is evident from the fact that it will undoubtedly affect procedures followed by the insurance industry in the sale of air travel insurance in commercial airports throughout the country. The publicity already given to the Court of Appeals' decision in this case is some evidence of its importance.[3]

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3. U. S. Law Week, October 8, 1968, Section 2, 37 L. W. 2193; 11 American Trial Lawyers Association Newsletter, December, 1968, p. 490.

I.

In Reversing the Trial Court's Determination of an Important Question of Kansas Law Without Citing Any Contrary Authorities in Support of Its Decision, the United States Court of Appeals Went Beyond Permissible Limits of Appellate Review Necessitating the Exercise of This Court's Supervisory Powers.

The question of Kansas law which the trial court initially was called upon to decide, and the question upon which the Court of Appeals' decision rested, was whether there was a duty on an insurance company selling insurance in a commercial airport to explain to the prospective purchaser the distinctive differences in the types of policies it sold, the two principal policies being a short-term general accident policy and a flight policy insuring against loss in flight and in going to or coming from the air terminal.

The trial court viewed the question in the light of the law of Kansas concerning conduct which constituted equitable fraud and the necessary conditions for reformation. Under Kansas law reformation will be granted where there is a mistake by one party, and the other party is guilty of inequitable conduct amounting to constructive fraud. *Federal Land Bank* v. *Bailey*, 156 Kan. 464, 134 P. 2d 409 (1943). The Kansas Supreme Court in *City of Clay Center* v. *Myers*, 52 Kan. 363, 365, 35 Pac. 25 (1893), quoted from Story and Black, as follows:

> " 'Fraud, in the sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.

> " 'Constructive fraud consists in any act of omission or commission contrary to legal or equitable duty, trust or confidence justly reposed, which is contrary to good conscience, and operates to the injury of another. The former implies moral guilt; the latter may be consistent with innocence.' (Black, Law Dict., § 517)." (p. 365).

The trial court noted that constructive fraud did not necessarily indicate a bad intention on the part of the fraudulent party; it merely indicated an act or omission which injures a third party and which is contrary to a duty imposed. (A. 20).

In *Joint School District* v. *Labette County Community High School*, 140 Kan. 63, 66, 33 P. 2d 948, 950, the Kansas court said:

> "The parties agree on what constitutes constructive fraud. Intent to deceive is not necessary to constitute constructive fraud. All that is necessary is an act or *omission* in breach of legal or equitable duty, or of trust or confidence justly reposed, which is contrary to good conscience and takes undue and unconscientious advantage of another, *or otherwise operates to his injury.*" (Emphasis supplied).

These principles were reaffirmed in the recent Kansas case of *Loucks* v. *McCormick*, 198 Kan. 351, 356, 424 P. 2d 555:

> "Actual fraud is an intentional fraud and the intent to deceive is an essential element thereof. Constructive fraud is a breach of a legal or equitable duty which, irrespective of the moral guilt, the law declares fraudulent because of its tendency to deceive others or violate a confidence and neither actual dishonesty of purpose or intent to deceive is necessary."

Viewed against the background of the Kansas authorities, the trial court reviewed the facts which were es-

tablished by the proof concerning the transaction in question which he felt were relevant to an application of the Kansas principles involving the intervention of equity. The trial court specifically found that respondent was guilty of constructive fraud and that petitioner was mistaken as to the coverage he was getting.

The sale of insurance of this kind usually is a hurried transaction. There was testimony to the effect that this transaction took only a couple of minutes. There are, in the area of the sales booth, machines which sell the T-20 type of flight insurance. The booth has the legend "Flight Insurance" prominently displayed. The plaintiff intended to get insurance which would cover the deceased from the time she left until she returned and, indeed, thought that the insurance had been procured. The defendant encouraged the sale of the general short-term accident insurance (T-18) over that of the "straight flight policy". (T-20). The agent did not explain the types of insurance available, but sold the T-18 contract to the Russells. There was a discussion of the four-day term, but the Russells were not told that the insurance would expire as of 11:00 a.m. the following Tuesday. (A. 20).

The Court found that all of these circumstances related to what a prospective purchaser of insurance might reasonably believe would be included in the coverage and constituted a part of the company's offer and were relevant to the question of whether a duty rested on the company to explain the type of coverage it was offering. The court had no difficulty whatsoever in finding that the company knew what its policies contained and knew that the prospective purchaser did not. The court reasoned that it was certainly not unreasonable to assume that everything sur-

rounding the transaction led the purchaser to believe he was buying air flight insurance and that if the company wished to sell short-term accident insurance, it should so inform the buyer so that he could make a decision between the two types of coverage. (A. 22).

The court concluded there was a "positive duty" on the insurance company to explain its two types of policies to the buyer and that in the instant case the duty was violated. The court concluded (A. 22):

> "The fact that the duty was violated put the plaintiff in a disadvantageous position, and he subsequently was mistaken as to what type of policy he had. The violation of the duty, and subsequent injury to plaintiff, amounted to such inequitable conduct as to constitute constructive fraud under Kansas law. See City of Clay Center v. Myers, supra. Why this happened, is not important. As was said in Gilbert v. Mutual Benefit Health and Accident Association, 172 Kan. 586, 593, 241 P. 2d 768 ..... (1952), '* * * reformation of an instrument will be granted without regard to the cause of the failure to express the contract as actually made, whether due to fraud, mistake in the use of language, or any other thing which prevented the expression of the true intention of the parties.' "

In reversing the trial court, the Court of Appeals acknowledged the accuracy of the trial court's statement of the general principles of equity that applied (A. 9), acknowledged that reformation would lie where there was mistake on the part of one party coupled with constructive or equitable fraud on the part of the other (A. 9), and then narrowed its inquiry to the question of the proper scope of the doctrine of equitable fraud and how it relates to the duty of an insurer to warn the customer about what he was buying. But in deciding that no duty existed, the Court seems to have abandoned the application of equitable

principles and placed its holding on the rule of non-variability of written contracts. (A. 11).

We call attention to the following significant features of the Court of Appeals' decision:

(1) The Court acknowledged the accuracy of the legal principles stated in the Kansas decisions which were relied upon by the trial court.

(2) The Court cited no Kansas law which compelled a conclusion different from the trial court's.

(3) It accepted the correctness of the trial court's findings of fact.

(4) It cited no general authority which conflicted with the trial court's conclusions.

(5) It cited no general authority in support of its own decision.

We respectfully submit that the language of the Court of Appeals' decision indicates quite clearly that it rests on that Court's own opinion as to what the law ought to be rather than on what Kansas would have said its law is.

The Honorable Arthur J. Stanley, Jr., the trial judge who reformed the contract in question, is a distinguished member of the Kansas bar and was, before becoming a United States District Judge, an eminent and respected practicing Kansas lawyer engaged in an extensive insurance law practice. Probably no Kansas lawyer was better informed as to the "intricacies and trends of local law", and his views and analysis of the law of Kansas in arriving at his judgment is, as this Court has said, "a highly desirable and important aid in its interpretation of state law." *Huddleston, et al.* v. *Dwyer,* 322 U.S. 232, 237.

It is with good reason that this Court has said that special weight will be given to the interpretation of the state

law by the trial judge who is a member of the bar of that state. *Bernhardt* v. *Polygraphic Company,* infra.

The Kansas Legislature, as well as the decision law of that state, has announced the high public policy of that state in insurance transactions. Kansas has made it clear that insurance contracts will not be regarded as ordinary contracts whereby the parties may bind themselves as they wish and out of this concern for the rights of the public in connection with insurance contracts the provisions of the State Insurance Code, which by law becomes a part of insurance policies, are strictly construed to protect the public interest. *Logan* v. *Victory Life Insurance Company,* 175 Kan. 88, 93, 97, 259 P. 2d 165, 169, 171 (1953).

The distinguished trial judge was in a particularly advantageous position by virtue of his years of practice as a Kansas lawyer to understand and appreciate the deep public concern with which Kansas scrutinized insurance transactions (R. 17) and it was with this special knowledge of the public policy of Kansas with respect to insurance transactions that he examined the duty of the respondent in the instant case.

In deciding whether the respondent owed a duty to petitioner to explain its insurance policies to petitioner, the Court of Appeals felt that the answer turned on a balancing of the competing interests of the parties; "the right of the public to be free of fraud and oppression wrought by those in a superior bargaining position" on the one hand and on the other the "realities of dealing with the public, enforcement of contracts, and instability which flows from opening up written contracts to oral accretions." (A. 11).

In reaching its decision, the appellate court appeared to co-mingle principles of equity and legal rights arising from the "long held notions of the non-variability of writ-

ten contracts." (A. 12). In this regard, we respectfully submit that the appellate court was applying considerations which in its own judgment were relevant rather than considerations which the Kansas court would probably have applied in reaching its decision.

We submit that the rule of maintaining the stability of the written contract is not a relevant consideration in a case which warrants reformation on equitable grounds. In *Brandwein* v. *Provident Mutual Life Insurance Company of Philadelphia,* 3 N.Y. 2d 491, 146 N.E. 2d 693 (1957), the New York Court of Appeals when confronted with similar objections to reforming a written contract said (l.c. 695):

> "As to the alleged defenses, it is settled that neither the Statute of Frauds nor the parol evidence prohibition forbids reformation of a written contract to include material orally agreed upon but, because of mutual mistake or unilateral mistake plus fraud, not inserted in writing. The authorities so holding are numerous and consistent (Gillespie v. Moon, 2 Johns Ch. 595, 5 Williston on Contracts (rev. ed.), § 1552, 2 Reed on the Statute of Frauds, § 475; Browne on the Statute of Frauds (5th ed.), § 441d; Dodge v. Wellman, 1 Abb. Ct. App. Dec. 624; 515, 517; Prior v. Williams, 42 N.Y. 231, 3 Abb. Ct. App. Dec. 624; DePeyster v. Hasbrouck, 11 N.Y. 582; Meyer v. Lathrop, 73 N.Y. 315; Friedman & Co. v. Newman, 255 N.Y. 340, 174 N.E. 703, 73 A.L.R. 95)."

The soundness of the trial court's interpretation of Kansas law in the instant case is fortified by the fact that even the most sophisticated of purchasers of insurance were deceived by respondent's sales methods. It so happened that the president of a chain of super markets, a Mr. McNabb (R. 367), was in the act of buying insurance at respondent's booth at the same time that petitioner was buying insurance for his wife. He thought he was buying air travel insurance. (R. 376). He was not interested in any other

kind of insurance. He was well covered otherwise. The only protection he wanted was in the air because he had all kinds of other insurance and he wouldn't pay extra money for the additional coverage. (R. 386-387). But, it turned out that Mr. McNabb too, thought he was getting one kind of insurance and got another. He too was sold the short-term general accident policy rather than the air travel policy! (See Exhibit 13; R. 377, 623).

The Court of Appeals observed that even though it was not explained to Reverend Russell by the insurer what the distinctive features of the coverage were, he was really better off because if Mrs. Russell had been killed on the ground or in a hotel fire she would still have had insurance. But the trial court, we believe, answered this argument most effectively by pointing out that the general accident policy was more expensive than the flight insurance, might be repetitious of other policies the insured had, and was more restrictive as to duration of coverage than straight flight insurance. As the trial court pointed out, the purchaser should have the right to select the kind of insurance he wants. (R. 59).

We respectfully submit that in view of the vantage point from which the trial judge examined the Kansas law and the fact that he was in a much more likely position to know what the Kansas courts would have done in the instant case, and the fact that the Court of Appeals made no effort to relate its holding to an extension of the Kansas cases nor to weigh the importance of the sensitivity of Kansas toward insurance transactions, all warrant the conclusion that the Court of Appeals decided this case in a way that was probably in conflict with the law of Kansas.

II.

In the Absence of a Showing That the Trial Court's Determination of the Crucial Question of Kansas Law Involved Here Was Clearly Erroneous, the Court of Appeals Was Bound to Accept That Determination. No Such Showing of Error on the Part of the Trial Court Was Made Here; Therefore, This Court Should Intercede to Prevent an Unwarranted Extension of the Federal Appellate Court's Power of Review.

In a long line of cases the United States Court of Appeals for the Tenth Circuit has restricted its authority to reverse the trial court's determination of local law unless that determination is clearly erroneous. *Mitton* v. *Granite State Fire Insurance Company,* 196 F. 2d 988 (10th Cir.); *Dallison* v. *Sears Roebuck & Company,* 313 F. 2d 343 (10th Cir.); *Kirby* v. *United States,* 329 F. 2d 735 (10th Cir.); *Bartch* v. *United States,* 330 F. 2d 466 (10th Cir.); *McCallister* v. *M-A-C Finance Company of Tulsa,* 332 F. 2d 633 (10th Cir.); *Cliborn* v. *Lincoln National Life Insurance Company,* 332 F. 2d 645 (10th Cir.); *Loye* v. *Denver U. S. National Bank,* 341 F. 2d 402 (10th Cir.); *Coe* v. *Helmerich-Payne,* 348 F. 2d 1 (10th Cir.); *Pittsburgh-Des Moines Steel Company* v. *American Surety Company of New York,* 365 F. 2d 412 (10th Cir.); *Industrial Indemnity Company* v. *Continental Casualty Company,* 375 F. 2d 183 (10th Cir.); *Smith* v. *Greyhound Lines,* 382 F. 2d 190 (10th Cir.); *Mutual Casualty Company* v. *MFA Insurance Company,* 384 F. 2d 111 (10th Cir.); *Foundation Reserve Insurance Company* v. *Kelly,* 388 F. 2d 528 (10th Cir.); *Hendrix* v. *New Amsterdam Casualty Company,* 390 F. 2d 299 (10th Cir.)

In *Dallison* v. *Sears Roebuck & Company,* supra, the Court of Appeals for the Tenth Circuit, said (l.c. 347):

> "In the absence of a decision by the Colorado Supreme Court on the question, we are governed by the well

established rule of this Court that we will accept the considered determination of the trial court as to the local law, unless clearly convinced to the contrary."

In *Coe* v. *Helmerich-Payne*, supra, the Court of Appeals for the Tenth Circuit said with respect to the interpretation of Kansas law by the same trial judge whose judgment was reversed in the instant case (l.c. 3-4):

> "Since the proper application of these facts finds no completely convincing solution in the adjudicated Kansas cases, we accept the trial judge's interpretation upon a matter of purely local law."

In *Industrial Indemnity Company* v. *Continental Casualty Company*, supra, the Court of Appeals for the Tenth Circuit said (l.c. 185):

> "There thus appear to be no decisions from Oklahoma courts which are in point or are analogous. Under these circumstances we have held in many cases that the decision of the trial court on what is the prevailing law of the state where he is sitting will be accepted on appeal unless it is clearly wrong. (Cite) The authorities from all jurisdictions are meager but the trial court's decision is within recognized bounds, and we cannot say that it is clearly wrong."

In *Pittsburgh-Des Moines Steel Company* v. *American Surety Company of New York*, supra, the Court of Appeals for the Tenth Circuit said (l.c. 416):

> "The Wyoming Supreme Court does not appear to have considered the question but the Judge of the United States District Court of Wyoming, experienced in Wyoming law, found the statute not to be a bar and, under the circumstances, we will follow the decision of the local judge."

The Court of Appeals for the Tenth Circuit has further held that in matters pertaining to the law of a particular state where there are no decisions of that state

in point the determination of the local law by the trial judge will be accepted unless that determination is clearly contrary to the general authorities. *Robert Porter & Sons, Inc.* v. *National Distillers Product Company*, 342 F. 2d 202, 205 (10th Cir.).

The rule of abstention from interfering with the trial judge's interpretation of local law is observed in the other circuits. *Owens* v. *White*, 380 F. 2d 310 (9th Cir.); *Universal Underwriters* v. *Wagner*, 367 F. 2d 866 (8th Cir.).

Where the state law is doubtful the Court of Appeals will not reverse if the trial court has reached a permissive conclusion as to state law. *Solomon* v. *Northwestern State Bank*, 327 F. 2d 720 (8th Cir. 1964); *Lee Shops, Inc.* v. *Shatten-Cypress Company*, 350 F. 2d 12 (C.A. Tenn.), cert. den. 382 U.S. 980.

This Court has ruled that in a diversity case, where the trial judge who is a member of the bar of the state whose law he is called upon to interpret decides a question of local law differently from the interpretation put upon it by the Court of Appeals, special weight will be given to the trial judge's statement of the local law. *Bernhardt* v. *Polygraphic Company*, 350 U.S. 198. In rejecting the Court of Appeals' interpretation of the state law which overruled the trial judge's interpretation and reinstating the trial judge's determination, this Court said in the Bernhardt case (l.c. 204):

> "Since the federal judge making those findings is from the state of Vermont, we give special weight to his statement of what the Vermont law is."

In diversity cases it is not the federal court's function to apply the rule of interpretation of state law which it thinks is wiser or better. It is the federal court's duty to ascertain what the state law is, not what it ought to be.

Hausman v. *Buckley*, 299 F. 2d 696, 705 (2nd Cir.); *Ideal Structures* v. *Levine-Huntsville Development Corporation*, 396 F. 2d 917, 922 (5th Cir.).

The Court of Appeals certainly needed to make a more detailed analysis of the law of Kansas and the authorities generally before it was warranted in upsetting the trial judge's determination of Kansas law as clearly erroneous.

Where there is no state decision determinative of the question, the federal court must consider all available data, including statements of law, treatises, law review commentaries, and the majority rule. *Helene Curtis Industries* v. *Pruitt*, 385 F. 2d 841 (5th Cir.). It should consider trends in modern legal thought which the court thinks would be accepted by the state court. *Gliedman* v. *Capital Airlines, Inc.*, (D.C. Md. 1967) 267 F. Supp. 298.

In a case controlled by *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64, as this case is, the federal courts must search for and apply the entire body of substantive law governing the identical question in the state courts. This inquiry includes the decisions of the state courts. *Ruhlin* v. *New York Life Insurance Company*, 304 U.S. 202, 209.

The authorities generally confirm the accuracy of the trial court's determination of the law of Kansas. In Williston on Contracts, Revised Edition, Volume 5, Section 1498, it is stated as follows:

> "* * * but if the transaction is known to be based by one party on the assumption of the existence or non-existence of a material fact, non-disclosure by the other party of his knowledge that the assumption is unfounded should fall within the definition of fraud." (p. 4184).

With particular reference to insurance contracts, Williston states (ibid, Section 1499):

> "In the case of insurance contracts, * * * failure to disclose material facts is already recognized by the law as fraudulent under the doctrine of *uberrimae fidei*, and the tendency in the law of sales, as well as in other contracts, is doubtless toward requiring a somewhat higher degree of good faith than formerly, *especially where the opportunities for information are not equally open to both parties.*" (pp. 4185-4187) (Emphasis ours).

The Restatement of the Law of Contracts, Volume II, Section 505, states the law as follows:

> "REFORMATION WHERE A MISTAKE OF ONE PARTY IS KNOWN TO THE OTHER.
>
> Except as stated in §§ 506, 509-511, if one party at the time of the execution of a written instrument knows not only that the writing does not accurately express the intention of the other party as to the terms to be embodied therein, but knows what that intention is, the latter can have the writing reformed so that it will express that intention.
>
> Comment:
>
> a. Under the rule stated in § 71 (c) knowledge by one party that the other is under a mistake as to the meaning of his words or acts prevents them from operating as an offer or acceptance. In cases covered by the rule stated in the present Section, there may be therefore not even a voidable contract; *but knowledge of one party not only that the other party's intention is something different from what the writing expresses, but also what the intention is, is sufficient ground for reforming the writing to conform to the unexpressed intention.* * * * On the other hand, where a reformation is based on mistake of one party and fraud of the other the defrauded party has also as an alternative the power of avoidance. (Emphasis supplied).

b. The rule stated in the Section is applicable whether the mistake was caused by misrepresentation by the other party or not.

Illustration:

1. A and B enter into a written contract for the transfer by A to B of certain land. B believes the conveyance contracted for will transfer ownership of underlying minerals, whereas it will not. A knows B's belief when the contract is executed. It will be reformed to conform to B's understanding."

The Court of Appeals stated that reformation is an ancient remedy rarely used and that the courts were reluctant to grant this relief. However, our research indicates the remedy is more freely granted. 28 Col. L. Rev. 1928:859, 902-903; *Gamnell* v. *Diethelm,* (Wash.) 368 P. 2d 718, 720-721 (1962); *Brandwein* v. *Provident Mutual Life Insurance Company of Philadelphia,* 3 N.Y. 2d 491, 146 N.E. 2d 693 (1957).

Petitioner respectfully submits that the reversal of the trial court's judgment, in the absence of any clear showing that his determination of the state law of Kansas as it applied to the facts in the instant case was erroneous, amounted to action on the part of the Court of Appeals that so far departed from accepted and established limits of judicial proceedings that this Court should exercise its supervisory power by granting the petition for the writ of certiorari.

CONCLUSION

The careful analysis of Kansas law by the trial judge in arriving at his judgment in the instant case, his especially intimate knowledge of Kansas law as a distinguished member of the Kansas bar, and on the other hand the failure of the Court of Appeals to challenge this

analysis of Kansas law or to cite any authorities which opposed the trial judge's determination of Kansas law, warrants the conclusion that the Court of Appeals' decision conflicts with the applicable law of Kansas and that the trial judge's determination of Kansas law was not clearly erroneous.

For all of the reasons stated herein this Court should grant a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER 1967 TERM

MUTUAL OF OMAHA INSURANCE COMPANY, a Corporation, Appellant, vs. ELMER D. RUSSELL, Appellee.	No. 9169
ELMER D. RUSSELL, Cross-Appellant, vs. MUTUAL OF OMAHA INSURANCE COMPANY, a Corporation, Cross-Appellee.	No. 9182

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

(Filed in the United States Court of Appeals, Tenth Circuit, September 30, 1968, William L. Whittaker, Clerk)

Henry G. Eager, for Appellant and Cross-Appellee.

John E. Shamberg, for Appellee and Cross-Appellant.

Before MURRAH, Chief Judge, BROWN* and HICKEY, Circuit Judges.

BROWN, Circuit Judge:

Does the speed of the modern jet age and the restless, irrepressible, increased tempo of all who are in its vortex

*Of the Fifth Circuit, sitting by designation.

impose on a flight insurer the obligation toward prospective policy buyers of explaining the distinctive differences of the several available coverages? Does the insurer's attractive sales booth, neon signs heralding the need for and availability of "flight insurance," and the other catchy advertising come-ons carry the inevitable message to scurrying people on the move the notion that the coverage is for the traveler's intended round trip rather than for a definitive period of time? And to avoid this misreading by people in a hurry of printed contracts plain enough that even those who run may read, must the insurer affirmatively take steps by extra-contract informational statements to overcome such misapprehension?

The District Judge, in effect, answered these broad inquiries in the affirmative. The failure to give such informational advice became, in his analysis, a constructive fraud upon which to base reformation of a flight insurance policy which, all now agree, did not by its terms cover the death of the Assured. In more austere terms the main issue presented for decision is whether the Assured[1] is entitled to reformation of a general accident flight insurance policy purchased at Insurer's[2] sales booth in the lobby of an airport. The District Court reformed the contract and awarded plaintiff $20,000. We hold that under the unusual fact situation of this case the insurance policy should not have been reformed and the decision of the District Court must be reversed.

To understand fully the Assured's theory a full recitation of the facts is helpful. Rev. and Mrs. Russell were residents of Kansas City, Kansas. On Thursday, January 24, 1963, upon receiving word that one of her brothers had died

1. This term includes Mrs. Russell and the named beneficiary Rev. Russell.

2. Mutual of Omaha Insurance Company, a corporate resident of Nebraska.

in Lubbock, Texas, Mrs. Russell decided to fly to Lubbock for the funeral. Reservations were made for a flight the next day, Friday, but the return flight was left open because the funeral date had not been set. On Friday Rev. and Mrs. Russell and their son[3] went to the airport in Kansas City, Missouri, picked up their tickets at the Continental Airlines counter, and proceeded toward the awaiting plane.

As the three Russells passed one of Insurer's vending machines for dispensing flight insurance, Rev. Russell decided that Mrs. Russell should have insurance to cover her during the trip. This machine dispensed Insurer's policy T-20. In many ways the T-20 affords severely limited coverage in that it provides protection only for accidents while aboard an airplane or in established limousines going to or coming from the airport. On the other hand, the T-20's coverage expressly remains in effect for the duration of the round trip or for twelve months, whichever occurs first. Similarly, since events and covered occurrences were more restrictive, the face amount of insurance per premium dollar was larger than other policies. Had a T-20 been machine-issued the Assured's death would have been covered. But no one had the proper change to operate the machine, so the Russells stepped just south of the machine to one of Insurer's staffed insurance booths. The booth had signs overhead reading "Flight Insurance" and was attended by a Miss Fletcher.

Rev. Russell asked either for flight insurance or insurance[4] to cover his wife on her round trip to Lubbock.

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3. The Russell's son Richard had decided at the last moment to join his mother on the trip because Mrs. Russell was upset over the death of her brother and had never flown before.

4. The testimony is conflicting as to what the exact statement was.

Miss Fletcher then asked "How much?", meaning what amount of insurance coverage. Mrs. Russell asked for the least amount and $20,000 was the amount agreed upon. Without then explaining various policies available (see note 8 infra), Miss Fletcher took out an application form and began to fill it out. She then asked either how long would Mrs. Russell be gone or when would she be returning. Mrs. Russell turned to her husband and asked "Three days?". Rev. Russell said she should allow herself more than that—at least four days. Miss Fletcher completed the form[5] and turned it around for Mrs. Russell's signature. Mrs. Russell signed and paid the $2.25 premium. Miss Fletcher stapled the policy together and handed it to Rev. Russell.

The policy purchased was not, however, the T-20; rather it was the T-18, a significantly different policy. The T-18 is a general accident policy that covers almost all risks—whether air related or not—during the life of the policy. The policy term is stated in terms of twenty-four

5. The following is a reproduction of the insurance form filled out by Miss Fletcher and Mrs. Russell.

SCHEDULE

Policy Number		Please Print
T18BA 29140 F		Name of Insured Mrs. Bertha Russell
Capital Sum $20,000		Address of Insured No. & Street 735 Osage; City KC State Kans
Principal Sum $10,000		Name of Beneficiary Rev. Elmer Russell
		Address of Beneficiary No. & Street; City same state
Term of Cov.	Prem.	Effective at: Hour 11:00 xA.M. P.M.
4 Days	$2.25	Date Jan. 25, 1963
Countersigned by Dorothy Fletcher Licensed Resident Agent		Place Kansas City, Mo.
		Signature: Bertha Russell

hour periods on a daily basis up to thirty-one days.[6] The premium is higher on the T-18 for the same dollar amount of insurance, and the T-18 is not sold in vending machines. As the Schedule signed by Mrs. Russell shows (see note 5 supra), the T-18 was issued for only four days, and expired at 11:00 a.m., Tuesday, January 29, 1963, about twelve hours prior to the Assured's death.

The District Court credited Rev. Russell's testimony that Miss Fletcher never mentioned any other available policies,[7] did not explain the T-18, and did not warn plaintiff that the policy would expire at 11:00 a.m. on Tuesday, January 29, 1963.[8] The Judge also found that the Assured

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6. "(a) This policy is issued in consideration of the payment in advance of the premium stated in the Schedule. It takes effect on the Date and Hour stated in the Schedule, Standard Time at the Place specified in the Schedule for the policy to become effective, and expires on the same hour at the end of the number of days stated in the Schedule as Term of Coverage."

7. Insurer sold eleven different types of insurance policies at its sales booth.

8. Insurer introduced testimony to show that the basic sales procedure of its employees was to explain at least two policies, the T-18 and the T-20, and let the customer choose between them. This testimony gained credence through the introduction of figures to show that the total number of T-18 and T-20 policies sold were about equal. But on this conflicting evidence, the trial judge found that no explanation was given of the different policies, and we accept this finding as not clearly erroneous. See F.R. Civ.P. 52(a).

On the issue of whether Miss Fletcher brought home the fact that the policy would expire at 11:00 a.m., Tuesday, January 29, 1963, the findings of the trial court are not crystal-clear. In a finding dictated into the record at the conclusion of the trial hearing, the Judge found that Miss Fletcher did state the term of the policy to be four days. But in a later formal memorandum decision, the Judge stated that "Miss Fletcher and the plaintiff and his wife discussed a four-day period for the insurance, but Miss Fletcher did not specifically tell the plaintiff and his wife that the policy would expire at 11:00 a.m. on Tuesday, January 29, 1963." On this record the Judge had ample basis for reconsideration and contrary to Insurer's insistence he was not bound to the earlier court-reporter recorded impression. We credit the finding that Miss Fletcher did not warn plaintiff about the expiration date at all.

intended to buy insurance that would cover Mrs. Russell's round trip, which both she and her husband thought would occur within four days.

After buying the insurance, Mrs. Russell boarded her plane and arrived safely in Lubbock, Texas. There the funeral was delayed because a son of the deceased had not arrived from England. The funeral was finally held on Tuesday, January 29, and Mrs. Russell was fatally injured when her airplane crashed that night at 10:45 p.m. while attempting to land at the Kansas City, Missouri, airport. The insurance policy had expired by its own terms about twelve hours earlier. The Insurer denied liability.

The Assured then pursued Insurer in this diversity of citizenship suit in Kansas on the theories that either (1) the insurance contract should be construed to cover the death of Mrs. Russell, or (2) the policy should be reformed to provide coverage for the return flight from Lubbock to Kansas City. The District Judge held that the contract was clear and unambiguous and as written did not cover the accident. But now of direct importance he held that as a matter of equity the policy should be reformed to cover the accident.[9] Judgment for $20,000 was entered for the

9. The Judge after discussing the facts summarized above followed this reasoning:

> "Under the circumstances, the [Insurer] created a situation in which its offer consisted of more than the words of the girl at the booth. It is commonly believed that insurance at airports purports to protect a person flying on a plane. The machines, the booth (with 'Flight Insurance' on it), and the fact that Mrs. Russell was at the airport for the purpose of boarding a plane, combined to give the Russells the idea of what they were buying before they stepped up to the booth. Viewed realistically, the Russells knew the general nature of the policy to be bought before they heard the sales girl's statements. Against this background, the girl at the booth did not explain that there were two different kinds of policies, but sold the one [T-18] urged by the [Insurer]. This policy purports to cover a different risk (general accident for a short term) than that covered by what is commonly understood to be flight insurance [T-20].

Assured. Insurer appealed contending that it is not liable since the policy had expired and the company was not guilty of any inequitable conduct that would give rise to the remedy of reformation. The Assured cross-appealed contending that the judgment should have been for $90,000, the amount of straight flight insurance (T-20) that $2.25 would have bought, but the Assured did not appeal the decision that the policy could not be construed to cover the accident. Thus the only substantive problem before us is whether the contract should, as a matter of equity, be reformed.

But before we reach the merits, with the suit being brought in a Kansas District Court by a Kansas resident on a contract made in Missouri, an *Erie*[10] problem of determining what state's law to apply arises. The District Court held that the Kansas conflicts rule is to apply Kansas law to this insurance policy. Insurer contends, albeit without

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"Under these circumstances, does the company have a duty to explain what is being sold, and what is available? If the duty exists, there was a violation of it here, and this violation could constitute sufficient inequity to be a basis for reformation. * * *

"What is really involved in this situation is that the [Insurer] is in a position to know what its policies contain, and knows that the prospective buyer cannot know. The buyer can make no intelligent choice if he does not know there is a choice to be made. It is not unreasonable in this situation to hold the [Insurer] to the knowledge that the [Assured] is asking about, talking about, and eventually buying insurance for the purpose of protection while riding on a plane. If the [Insurer] wishes to sell a different policy (short-term accident, personal property theft, or whatever), it should be required to inform the buyer, who is in the position of having to take what is offered. * * *

"I therefore find that if it wishes to sell the short-term accident policy, there is a positive duty on the [Insurer] in this situation to explain that there are two types of policies, in order that the buyer may make a choice between them. In the instant case this explanation was not given; the duty was violated."

10. Erie R.R. Co. v. Tompkins, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.

much vigor, that Kansas follows the lex locus contractus rule and a Kansas state court would apply Missouri law.[11] Even the trial judge acknowledged that the *Erie—Stentor Electric*[12] lights are dim here. Although it makes little difference in this case what the Kansas conflicts rule may be since Insurer admits there is no substantial variation between the relevant Kansas and Missouri law, we hold for Kansas that in a suit such as this one, involving an adhesion insurance contract, Kansas would apply its own law to a suit brought in its court by a Kansas resident. Although this is deciding what Kansas would decide on a question they have never decided,[13] the case of *Hildebrand* v. *Washington Nat'l Ins. Co.*, 155 Kan. 220, 124 P.2d 510 (1952), is inferentially controlling. In that case the conflicts problem was pleaded and argued in a suit on an insurance policy made in another state by a Kansas resident. Without discussion of the problem, the Kansas court applied Kansas law. Without further discussion we do the same.[14]

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11. *Cf.* Hefferlin v. Sinsinderfer, 2 Kan. 401 (1864), a non-insurance contract action in which the Kansas Supreme Court followed the traditional conflict rule of lex locus contractus.

12. Klaxon Co. v. Stentor Elec. Mfg. Co., 1941, 313 U.S. 487, 61 S.Ct. 1020, 85 L. Ed. 1477. In that case the Supreme Court held that a District Court sitting in a diversity suit must apply the conflicts of law rules that the state court would follow.

13. This is a little less difficult than the problem posed in Judge Friendly's celebrated *Erie* comment: "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought." Nolan v. Transocean Air Lines, 2 Cir., 1960, 276 F.2d 280, 281, *rev'd*, 1961, 365 U.S. 293, 81 S.Ct. 555, 5 L. Ed. 2d 571, *on remand*, 290 F.2d 904.

14. No case cited by Insurer shows that this court has ever really decided this question before. Thomas v. Continental Cas. Co., 10 Cir., 1955, 225 F.2d 798, involves much the same problem as the present one, but since there neither party disagreed on the applicable principles of law, no analysis of the problem was made by this Court. On the other hand, the District Judge below made an extended analysis of Kansas decisions before reaching his result. Since there are no Kansas decisions in point, we will follow his decision unless clearly convinced to the contrary. Cliborn v. Lincoln Nat'l Life Ins. Co., 10 Cir., 1964, 332 F.2d 645.

The question thus remains: What would Kansas do with this case? More specifically, can the Trial Judge's approach of a duty to explain and a failure to do so which he set forth in his opinion (see note 9 supra) in persuasive fashion be sustained? We think not.

Neither party disagrees about the general principles of equity applicable here.[15] The rub comes in the proper application of those principles to the facts of this case. Reformation is an ancient remedy used to reframe written contracts to reflect accurately the real agreement between contracting parties when, either through mutual mistake or unilateral mistake coupled with actual or equitable fraud by the other party, the writing does not embody the contract as actually made.[16]

But reformation is an extraordinary remedy, and courts exercise it with great caution. 13 Appleman, *Insurance Law and Practice* § 7608 (1943). Even in situations where

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The following provision of the insurance policy should also be considered in connection with the choice-of-law problem:

"11. Conformity with State Statutes. Any provision of this policy which, on its effective date, is in conflict with the statutes of the state in which the Insured resides on such date is hereby amended to conform to the minimum requirements of such statutes."

The trial judge held that the only reasonable explanation for this provision was that the parties had contracted with Kansas law being contemplated as the applicable law. Since Kansas will allow parties to contract in regard to the applicable law, see Rankin v. United Commercial Travelers, 1964, 193 Kan. 248, 392 P.2d 894, we agree that this reasoning provides a basis for holding that Kansas law is the proper law to apply.

15. And neither party disagrees that this is a case of first impression.

16. Simmons Creek Coal Co. v. Doran, 1892, 142 U.S. 417, 12 S.Ct. 239, 35 L. Ed. 1063; Prudential Ins. Co. v. Strickland, 6 Cir., 1951, 187 F.2d 67; Gilbert v. Mutual Benefit Health & Acc. Ass'n, 1952, 172 Kan. 586, 241 P.2d 768; Hoxsey Hotel Co. v. Farm & Home Savings & Loan Ass'n, 1942, 349 Mo. 880, 163 S.W.2d 766; 3 Pomeroy, *Equity Jurisprudence* §870 (Symous ed. 1941); Restatement, *Contracts* §491 (1932); Covington, *Reformation of Contracts of Personal Insurance*, 1964 U. Ill. L.F. 548.

obvious mistakes have been made, courts will not rewrite the contract between the parties, but will only enforce the legal obligations of the parties according to their original agreement.[17] Strouhal v. Allied Dev. Co., 10 Cir., 1955, 220 F.2d 541; 76 C.J.S. Reformation of Instruments § 18 (1952). Here, of course, the Assured does not contend that mutual mistake occurred and it is well that he does not do so for obviously the Insurer intended to sell the exact policy with the exact coverage that it did. Rather, the Assured's theory rests on another accepted reformation doctrine—mistake by one party coupled with constructive or equitable fraud by the other.[18]

Thus the whole case boils down in reality to one question: Did Insurer have a duty to tell the Assured that several insurance policies were available and to explain fully the provisions and limitations of those policies? Without this supposed duty (and its breach) the District Judge would have had no basis for judge-reformation of the contract to conform to a regular straight flight insurance policy which Insurer was offering for sale. Rules of construction,

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17. The most common situation calling for reformation is where both parties commit error in embodying the final written agreement, thereby giving rise to the mutual mistake doctrine. See, *e.g.*, Russell v. Shell Pet. Corp., 10 Cir., 1933, 66 F.2d 864; Waddle v. Bird, 1927, 122 Kan. 716, 253 Pac. 576; 76 C.J.S. *Reformation of Instruments* § 28 (1952).

18. See, *e.g.*, Stern v. National City Co., D.Minn. 1938, 25 F.Supp. 948; City of Clay Center v. Meyers, 1893, 52 Kan. 363, 35 Pac. 25.

The general definition is stated in 1 Story, *Equity Jurisprudence* §258 (1852):

> "By constructive frauds are meant such acts or contracts, as, although not originating in any actual evil design, or contrivance to perpetuate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud. . . ."

See also 37 C.J.S. *Fraud* § 2(c) (1943).

either generally[19] or with particular reference to the liberalizing impact of traveler haste in acquiring air-flight insurance,[20] are of little help since on construction the Assured fails altogether. The problem is one of the proper scope of the doctrine of equitable fraud and the manner in which that doctrine relates to the duty of an insurer to warn the customer about what he is buying.

As in nearly all cases, an inquiry of this type involves consideration of the competing interests. On the one hand we have the right of the public to be free of fraud[21] and oppression wrought by those in a superior bargaining position. But on the other hand we are confronted with the realities of doing business, the enforcement of contracts, and instability which flows from opening up written contracts to oral accretions.

The Assured urges, and the District Court declared, that an explanation was owing. By whom was it to be given? In what form was it to be offered? Orally or in writing? If orally, how would an insurer conscious of its duty of fair dealing toward a peripatetic public in a hurry

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19. Insurance contracts, because of the inequality of the bargaining position of the parties, are construed strictly against the insurer. See, *e.g.*, Indemnity Ins. Co. v. Pioneer Valley Sav. Bank, 8 Cir., 1965, 343 F.2d 634; Prime Drilling Co. v. Standard Acc. Ins. Co., 10 Cir., 1951, 189 F.2d 315; Connecticut Fire Ins. Co. v. Reliance Ins. Co., D.Kan., 1962, 208 F.Supp. 20.

20. See Rosen v. Fidelity & Cas. Co., E.D.Pa., 1958, 162 F. Supp. 211. Nor does the Assured get any help from the two state cases, Stevens v. Fidelity & Cas. Co., 1962, 27 Cal. Rptr. 172, 377 P.2d 284, and Lachs v. United States Fid. & Cas. Co., 1954, 306 N.Y. 357, 118 N.E.2d 555, so heavily pressed by the Assured. There courts reformed flight insurance policies which excluded coverage for flights on non-scheduled airlines operating out of the terminal where the policies were bought. We express no opinion as to the correctness of these decisions, but say only that they are not in point here. Those policies had deeply-buried provisions to deny recovery, and the policies were sold by machines set up right in front of the non-scheduled airlines' ticket counters.

21. Misrepresentation and fraud in the usual sense, not present here, call for quite different considerations.

assure that an adequate, reliable statement was made? The "explanation" would vary as work shifts changed and sales personnel rotated. They would be expansive or restrictive as the loquacious or taciturn quality of the employee predominated. If the insurer turned to a written statement, how or in what manner would it assure itself that the impatient prospect would pay any more heed to it than the terms of the policy contract? And what happens when, out of an abundance of good faith, an effort is made to explain (in nonlegalese) what a legal document prescribes? And as to either method or a mixture of both, what are the significant distinctions to be pointed out? Which ones to emphasize? To minimize? To omit? How many policies need to be explained? Just the two most common—T-20 and T-18? Or all eleven? In the meantime what is happening to time—that precious irreplaceable which accounts for the traveler's pressure at the airport facing either dispensing machine or an attractive sales person who may well try harder but without benefit of a legal education? The flight would either be missed or the "offer" of flight insurance withdrawn for want of adequate time for equity's mandated "explanation."[22] Hardship, or what seems to be hardship, may sometimes occur if the law adheres to its long-held notions of the non-variability of written contracts. But a too-quick relaxation in the contrails of the jet age might well be worse, not better.[23]

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22. Of course, if an answer to an inquiry by a prospect or by an affirmative statement made by the insurer's agent to the prospect it was indicated that the policy would cover the round trip, then the insurer would certainly have to give some explanatory warning before issuing a T-18 policy which is for a fixed period of time, and not written in terms of round trip.

23. Consider, for example, the T-18 policy which Rev. Russell bought. Although it is a short-term policy, the coverage provisions are much broader and more inclusive than a straight flight insurance policy (the T-20). For example, if Mrs. Russell had been killed in a taxi smash-up while riding to the Lubbock airport for her return flight, or had she been killed in a hotel fire while

We think that imposing a duty to offer such explanations under circumstances of this kind—requiring as it does an effort by lay persons to interpret the legal meaning of the proposed contract as well as others available—would be fraught with great danger to the stability of contracts. We do not think Kansas would embrace such a view and for Kansas we decline to sky-write such an *Erie* judgment.

The printed contract controls. There it ends.[24]

REVERSED.

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there, she would have been covered under the T-18 but not under the T-20. Would the machine-sale of a T-20 be defective for want of a warning recording that at the nearby counter, better or different coverage was available?

24. This disposition of the suit makes unnecessary any discussion of the assured's cross-appeal in which $90,000 was claimed as the proper reformed recovery. It also renders unnecessary any discussion of Insurer's covert assertions that the Assured's proof did not rise to the necessary clear and convincing degree. See Federal Land Bank v. Bailey, 1943, 156 Kan. 464, 134 P.2d 409.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ELMER RUSSELL,
Plaintiff,
vs.
MUTUAL OF OMAHA INSURANCE COMPANY,
Defendant.
No. KC-1919

Memorandum, Findings of Fact and Conclusions of Law

(Filed April 6, 1966.)

MEMORANDUM

The first issue presented is whether the law of the state of Missouri, or that of Kansas, governs this action. It is admitted that the policy was sold and delivered in Missouri, and the parties originally stipulated at the pretrial conference that Missouri law would govern. However, the plaintiff later filed a motion to modify the pretrial order to provide that Kansas law is applicable in this action. As grounds therefor, the plaintiff points to a provision in the insurance contract which reads:

> "*11. Conformity with State Statutes*: Any provision of this policy which, on its effective date, is in conflict with the statutes of the state in which the Insured resides on such date is hereby amended to conform to the minimum requirements of such statutes."

The insured in this case lived in Kansas, and the plaintiff contends that Kansas law is thus contemplated by the parties as being the applicable law. The plaintiff states that he had overlooked this provision of the policy in the orig-

inal pretrial conference. Ruling on the motion was deferred until this time.

This court, in deciding a diversity question, must apply the law of Kansas, including that state's conflicts of laws rules. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). The question, then, is what is Kansas' conflicts rule in this case. The defendant contends that Kansas follows the doctrine of *lex loci contractus* (see *Hefferlin* v. *Sinsinderfer*, 2 Kan. 401 (1864)), and thus the law of Missouri, where the contract was made, is applicable. The plaintiff, however, maintains that in the determination of insurance questions, the Kansas Supreme Court would apply the law of Kansas. Also the plaintiff points to the above-mentioned provision of the policy as expressing an intention of the parties to be bound by Kansas law.

The answer to the question is somewhat in doubt. It is true that the federal courts, interpreting Kansas law, have often followed the *lex loci contractus* doctrine in accident or life insurance cases. See, *e. g.*, *Preferred Acc. Ins. Co.* v. *Clark*, 144 F.2d 165 (10th Cir. 1944); *Prudential Ins. Co. of America* v. *Carlson*, 126 F.2d 607 (10th Cir. 1942); *Fagan* v. *John Hancock Mut. Life Ins. Co.*, 200 F.Supp. 142 (D. Kan. 1961). Thus, laws of other states than Kansas have been applied in all of these cases. However, in all of the federal cases on the subject, the Kansas case cited for authority is the *Sinsinderfer* case, *supra*, and that case did not involve insurance.

On the other hand, extended research has failed to reveal any cases in Kansas where the Supreme Court has applied any other state's law to accident or life insurance (with one exception, which is discussed below). In many cases, this probably is because the conflicts issue was never raised. In others (see, *e. g.*, *See* v. *United Ins. Co.*, 171 Kan. 146, 230 P.2d 1008 (1951); *Stewart* v. *Mutual*

Benefit Health & Acc. Ass'n, 135 Kan. 138, 9 P.2d 977 (1932)), the usage of Kansas law is consistent with the *lex loci contractus* doctrine, in that the holding seems to be that there are actually Kansas contracts involved. However, in *Hildebrand* v. *Washington Nat'l Ins. Co.,* 155 Kan. 220, 124 P.2d 510 (1942), the question of conflicts was specifically pleaded and raised. The action was on an accident insurance policy. The defense in part was that the policy was issued and delivered in Iowa and hence was not subject to Kansas law. The court ignored the contention and applied Kansas law, eventually deciding for the defendant. The rule to be gleaned from this case would seem to be that where a Kansas resident is involved in an insurance question, the public policy of Kansas requires the usage of Kansas law. The Supreme Court of Kansas has recognized the quasi-public nature of insurance contracts. In another context, but speaking of insurance, the court has stated, "(I)nsurance contracts are not regarded in the law as are ordinary contracts where parties may bind themselves as they wish." *Logan* v. *Victory Life Ins. Co.,* 175 Kan. 88, 93, 259 P.2d 165, 168 (1953). Although that case involved a contract clearly subject to Kansas law, it is important to note the high public policy of Kansas in the protection of its citizens in matters of insurance.

In none of these cases does the Kansas Supreme Court state that the rule it is following is any different from the traditional *lex loci contractus.* However, the holdings do not always conform with that doctrine. The federal court cases cited above are somewhat persuasive, but are not compelling. I must decide what the Kansas Supreme Court would do with the question today, not what other courts have thought the Kansas Court would do. The net result of the Kansas opinions in the area lead me to the conclusion that Kansas has a high policy interest in insurance, and where possible, it will apply Kansas law to insurance cases involving Kansas citizens.

The only case found in which another state's law was applied was *Rankin* v. *United Comm'l Travelers of America*, 193 Kan. 248, 392 P.2d 894 (1964). Unfortunately, that case does not illuminate this area because there the parties agreed that Ohio law should govern. The court specifically cited the agreement by the parties as its reason for using Ohio law. Thus, while this case does demonstrate that the Kansas Court will use another state's law in deciding an insurance question, it is authority only for the proposition that the parties can agree to such a decision.

The added element in the instant case is the provision in the insurance contract providing for conformity with the statutes of the insured's state. According to general conflicts law, parties can contract for the applicability of a certain state's law, where the law of that state is not repugnant to the public policy of the forum. Of course, Kansas law is not repugnant to this forum. The policy provision in question applies to the other parts of the insurance policy, and affects the validity of other provisions. The only meaning that can reasonably be given, is that the parties at the time of the contract contemplated the application of Kansas law. If this were not true, the insured's residential state would be of no importance and need not be mentioned. Although no Kansas cases have been cited in which the Kansas Court followed the doctrine of allowing a party to contract to the application of a certain state's law, the *Rankin* case, *supra*, shows that the court did allow the parties to agree as to which state's law should be applied.

In view of the clear language of the provision in the policy, along with the Kansas Supreme Court's interest in insurance and its readiness to find Kansas law applicable, I believe that the Kansas conflicts rule in this case is that Kansas law applies.

As to the merits of the case, the plaintiff relies on two theories. Its position is (1) that on equitable grounds the contract of insurance purchased by the plaintiff was not the contract he expected or asked for, and therefore the court should reform the contract to reflect the true intention of the parties; or (2) the proper construction of the contract should be that the coverage extended beyond when Mrs. Russell met her death in the air crash. The defendant maintains that the plaintiff paid for, and got, a clear, unambiguous insurance policy, and that he is bound by the language of the policy.

I will deal with plaintiff's second theory first. The contract provides, under *Additional Provisions*, that:

> "(a) This policy is issued in consideration of the payment in advance of the premium stated in the Schedule. It takes effect on the Date and Hour stated in the Schedule, Standard Time at the Place specified in the Schedule for the policy to become effective, and expires on the same hour at the end of the number of days stated in the Schedule as Term of Coverage."

This language is clear and unambiguous. "All ambiguities will be resolved against the insurer, but the insured is charged with the plain ordinary meaning of inartistic words, and we will not torture words to import ambiguity where ordinary meaning leaves no room for such." *Thomas* v. *Continental Cas. Co.*, 225 F.2d 798, 801 (10th Cir. 1955). It is evident that the plaintiff cannot recover on the contract as written, for it expired before the fatal crash occurred. Thus, even under plaintiff's second theory, a reformation of the contract would be necessary. This theory, as an action at law, must therefore fail. The facts involved, however, are relevant to the first theory—*i.e.*, whether the plaintiff is entitled to reformation.

Before discussing the actual question of whether or not the contract is to be reformed, it is noted that the plaintiff

has asked in the alternative for $20,000 and $90,000. The $20,000 is the face amount of the policy issued, and the $90,000 is the stipulated amount of insurance the plaintiff's premium would have bought if the T-20 flight policy had been issued. In light of the finding of fact that the plaintiff intended to buy only $20,000 of insurance, it is apparent that he would not be entitled to recover $90,000. Reformation is an equitable remedy and is designed to effectuate a meeting of minds of the parties. See *Gilbert* v. *Mutual Benefit Health & Acc. Ass'n,* 172 Kan. 586, 241 P.2d 768 (1952). The parties' minds in the instant case clearly met on the sum of $20,000. A recovery of a greater sum would not be doing the justice for which equity is designed.

With the preliminary matters disposed of, we now come to the central issue in this case—*i.e.,* is the plaintiff entitled to have the policy reformed? The doctrine of reformation may be invoked where there is a mistake by one party, and the other party is guilty of constructive fraud or inequitable conduct. *Federal Land Bank* v. *Bailey,* 156 Kan. 464, 134 P.2d 409, (1943). The Kansas Supreme Court in *City of Clay Center* v. *Myers,* 52 Kan. 363 (1893), quoted from *Story* and *Black,* as follows:

> " 'Fraud, in the sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.' (1 Story, Eq. Jur., § 187.)
>
> " 'Constructive fraud consists in any act of omission or commission contrary to legal or equitable duty, trust or confidence justly reposed, which is contrary to good conscience, and operates to the injury of another. The former implies moral guilt; the latter may be consistent with innocence.' (Black, Law Dict. § 517.)" (p. 365).

Thus constructive fraud does not necessarily indicate a bad intention on the part of the fraudulent party; it merely indicates an action or omission which injures the third party and which is contrary to a duty owed.

Whether reformation is to be granted in a given case will depend upon the circumstances of that case. It is helpful here to review the facts relevant to the transaction in question.

The sale of insurance of this kind usually is a hurried transaction. There was testimony to the effect that this transaction took only a couple of minutes. There are in the area of the sales booth, machines which sell the T-20 type of flight insurance. The booth has the legend "Flight Insurance" prominently displayed. The plaintiff intended to get insurance which would cover the deceased from the time she left until she returned, and, indeed, thought that that insurance had been procured. The plaintiff and Mrs. Russell thought that she would be returning within four days. The defendant encouraged the sale of the general short-term accident insurance (T-18) over that of the "straight flight policy" (T-20). The agent did not explain the types of insurance available, but sold the T-18 contract to the Russells. There was a discussion of the four-day term, but the Russells were not told that the insurance would expire as of 11:00 a. m. the following Tuesday.

Under the circumstances, the insurance company created a situation in which its offer consisted of more than the words of the girl at the booth. It is commonly believed that insurance at airports purports to protect a person flying on a plane. The machines, the booth (with "Flight Insurance" on it), and the fact that Mrs. Russell was at the airport for the purpose of boarding a plane, combined to give the Russells the idea of what

they were buying before they stepped up to the booth. Viewed realistically, the Russells knew the general nature of the policy to be bought before they heard the sales girl's statements. Against this background, the girl at the booth did not explain that there were two different kinds of policies, but sold the one urged by the defendant company. This policy purports to cover a different risk (general accident for a short term) than that covered by what is commonly understood to be flight insurance.

Under these circumstances, does the company have a duty to explain what is being sold, and what is available? If the duty exists, there was a violation of it here, and this violation could constitute sufficient inequity to be a basis for reformation.

With this in mind, I turn specifically to that question.

No cases have been found, or cited, which are directly in point. The area of insurance sold at airports has received some discussion in other contexts. It has been held that these policies are to be construed liberally (*Fidelity & Cas. Co. of N. Y.* v. *Smith,* 189 F.2d 315 (10th Cir. 1951)), and that that construction rule "is applicable in the highest degree to a policy of this kind." *Rosen* v. *Fidelity & Cas. Co. of N. Y.*, 162 F. Supp. 211 (E.D. Pa. 1958). The court in the *Rosen* case recognized that the hurried nature of the transaction placed a higher duty on the insurance company. These construction cases are not applicable to this case because here the policy is not being construed, it is being reformed. They do, however, suggest the inequality of the bargaining positions of the parties. See also *Messina* v. *Mutual Benefit Health & Acc. Ass'n,* 228 F.Supp. 865 (D. D.C. 1964), *aff'd,* 350 F.2d 458 (D.C. Cir. 1965), *cert. denied,* 34 Law Week 3283 (February 22, 1966).

What is really involved in this situation is that the insurance company is in a position to know what its policies contain, and knows that the prospective buyer cannot know. The buyer can make no intelligent choice if he does not know there is a choice to be made. It is not unreasonable in this situation to hold the company to the knowledge that the plaintiff is asking about, talking about, and eventually buying insurance for the purpose of protection while riding on a plane. If the company wishes to sell a different policy (short-term accident, personal property theft, or whatever), it should be required to inform the buyer, who is in the position of having to take what is offered. The argument that the short-term accident policy not only covers what the flight policy does, but more, is not impressive. The accident policy is more expensive, may be repetitious to other policies the insured has, and, most importantly, contains limitations not contained in the straight flight policy. It could not be argued seriously that the company could sell a completely different type of insurance (a theft policy, for example) without explaining the difference to the buyer.

I therefore find that if it wishes to sell the short-term accident policy, there is a positive duty on the insurance company in this situation to explain that there are two types of policies, in order that the buyer may make a choice between them. In the instant case this explanation was not given; the duty was violated.

The fact that the duty was violated put the plaintiff in a disadvantageous position, and he subsequently was mistaken as to what type of policy he had. The violation of the duty, and subsequent injury to plaintiff, amounted to such inequitable conduct as to constitute constructive fraud under Kansas law. See *City of Clay Center* v. *Myers, supra. Why* this happened, is not important.

As was said in *Gilbert* v. *Mutual Benefit Health & Acc. Ass'n*, 172 Kan. 586, 593, 241 P.2d 768, ... (1952), "* * * reformation of an instrument will be granted *without regard to the cause* of the failure to express the contract as actually made, whether due to fraud, mistake in the use of language, or any other thing which prevented the expression of the true intention of the parties." (Emphasis added).

There is an additional factor in this case which has not been discussed. It was established by the evidence that although Miss Fletcher did not specifically say that the policy was to expire at 11:00 a. m. Tuesday, she did have a discussion with the Russells relative to a four-day period. No one could remember specifically what was said. If the plaintiff should have known from this discussion that the policy expired before the airliner crashed, he would not be entitled to reformation of the instrument because he would have known before he left the booth what he had bought. However, I do not believe that this general discussion bars the plaintiff in this case. The plaintiff is a layman, unskilled in the technicalities of the insurance business or the law. The discussion was held in the context of the date Mrs. Russell would be returning from Texas. It is probable that the plaintiff understood the language to be more informational for the company than essential to the coverage. In the absence of a specific statement as to when the policy would expire, it is unrealistic to give this conversation much importance when viewed in the context of the plaintiff's misunderstanding as to what type of policy he was buying. This is especially true because the defendant, albeit inadvertently, was responsible for the misunderstanding.

In short, the general situation presented is one of the insurance company offering one thing and selling another.

Its advantageous dealing position enabled it to do this without the plaintiff's knowledge. The result, in effect, is an unconscionable bargain, amounting to that degree of unintentional inequitable conduct which—combined with the mistake of the plaintiff—gives rise to the remedy of reformation.

There is one more point which must be considered. After the policy was sold, and before the accident, the plaintiff had the policy in his possession and had an opportunity to read it. The question this presents is usually framed in terms of whether this constitutes negligence on the part of the plaintiff which would bar him from the remedy of reformation. See Annot. 81 A.L.R.2d 7 (1962).

This is one area that the Kansas Supreme Court has fully decided. The view taken by the court is that the insured has the right to rely on the policy being as it was intended to be in the parties' agreement. Thus, there is no duty to read an insurance policy, and failure to so do will not be a bar to reformation. *Stewart* v. *Commonwealth Cas. Co.*, 137 Kan. 919, 22 P.2d 435 (1933); *Hammond* v. *Insurance Co.*, 100 Kan. 582 (1917); *Pfiester* v. *Insurance Co.*, 85 Kan. 97 (1911)

The plaintiff is entitled to reformation of the policy in the instant case, and the failure to read the policy will not bar him from this remedy.

Counsel for the plaintiff will prepare and submit a judgment entry in accordance with the views herein expressed.

FINDINGS OF FACT

1. The plaintiff is a resident of the state of Kansas, and the defendant is a corporation, organized and having its principal place of business in the state of Nebraska.

2. The amount in controversy exceeds $10,000.

3. On January 29, 1963, at approximately 10:45 p. m., the plaintiff's deceased, Bertha Russell, was killed while traveling by air from Lubbock, Texas, to Kansas City, Missouri. Plaintiff was the beneficiary under the insurance policy (Exhibit 11).

4. On January 25, 1963, the plaintiff purchased the policy in question; although the policy was paid for by Mrs. Russell, the entire transaction surrounding the purchase of the policy was handled by the plaintiff.

5. On at least four earlier occasions the plaintiff had purchased insurance on his own life while traveling by air, but neither on any of those occasions, nor on January 25, 1963, did the plaintiff have any real conception as to any difference or any understanding of any difference in the types of policies sold to air travelers.

6. There is no evidence that the plaintiff or his wife asked for any particular type or plan of insurance.

7. The plaintiff and his wife intended to purchase a policy that would insure Mrs. Russell's life from the time of her departure from Kansas City to her return to Kansas City, in the amount of $20,000.

8. The plaintiff and Mrs. Russell believed that the policy purchased would insure Mrs. Russell's life from the time of her departure from Kansas City, to the time of her return to Kansas City, in the amount of $20,000.

9. Both the plaintiff and his wife believed that her return would be within four days from the time of departure from Kansas City.

10. The plaintiff and Mrs. Russell did not intend to, and did not believe, that insurance in any amount exceeding $20,000 had been purchased.

11. The defendant, as a matter of policy, encouraged the sale by its agents of the T-18 form of policy rather than the T-20 form of policy, and those agents included Miss Fletcher.

12. Miss Fletcher did not explain to the plaintiff or to his wife the difference between the types of policies available. She did not state to the plaintiff, "We have two separate kinds of policies," or words to that effect.

13. Miss Fletcher and the plaintiff and his wife discussed a four-day period for the insurance, but Miss Fletcher did not specifically tell the plaintiff and his wife that the policy would expire at 11:00 a. m. on Tuesday, January 29, 1963."

14. Neither the plaintiff nor his wife read the policy purchased (Exhibit 11), before the crash of the plane, Flight 290, in which Mrs. Russell lost her life, although the policy was in the possession of the plaintiff and could have been read by him.

CONCLUSIONS OF LAW

1. This court has jurisdiction.

2. The law of Kansas governs this action.

3. The contract of insurance clearly and unambiguously provides for termination of coverage at 11:00 a. m., Tuesday, January 29, 1963. Thus, the plaintiff cannot recover on the basis of the contract as written.

4. The defendant owed a duty to plaintiff to make it clear what he was purchasing; this duty was breached.

5. The plaintiff is entitled to reformation of the contract, to cover the return flight from Texas.

6. The plaintiff's failure to read the insurance policy is not negligence such as to bar him from recovery here.

7. The plaintiff is entitled to judgment in the sum of $20,000.

Dated at Kansas City, this 6th day of April, 1966.

(Signed) Arthur J. Stanley, Jr.
Chief Judge

SUPREME COURT, U. S.

APR 7 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1037

ELMER D. RUSSELL,
Petitioner,

vs.

MUTUAL OF OMAHA INSURANCE COMPANY,
a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1037

ELMER D. RUSSELL,
Petitioner,

vs.

MUTUAL OF OMAHA INSURANCE COMPANY,
a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ADDITIONAL PROCEEDINGS IN THE DISTRICT COURT

In addition to the opinion which is appended to the Petition (A14-A27), back on November 24, 1964 (App. 30) at the immediate conclusion of the trial the District Court also made these findings, *inter alia*:

"The Court: . . . . . From what I have heard here there is actually very little dispute as to the facts. The facts seem to be fairly well agreed on and I have, I went through my notes last night, and watched this morning to see whether there was anything received in evidence that would in any way affect the findings that I propose to make, and I think I'm prepared at this time to make the findings of fact.

I'm not prepared to make the conclusions of law or arrive at my judgment because I haven't read your briefs and I don't know just what law—what the result should be when the law is applied to the facts as I find them. I see no reason why I should not now announce my findings of fact and I will read your briefs and will, of course, give you an opportunity to point out wherein you feel, if either of you do, that I have found facts not supported by the evidence. . . . .

I find that there is no evidence that the—that the plaintiff or his wife asked for any particular type or plan of insurance.

Now, there was testimony, Rev. Russell stated, initially that he had asked for flight insurance, but on further examination stated, as I recall it, that he did not recall just what he had asked for and could not say that he had asked for flight insurance, and my finding in this respect is supported by the one I made earlier, that I do not believe that Rev. Russell had any real understanding of different types of insurance sold to air travelers. . . . .

I find that Miss Fletcher did state to the plaintiff and the plaintiff's wife, that the terms of the policy purchased by the plaintiff was four days from the time of issue. . . . .

Now, as I say, gentlemen, I don't know what the judgment should be. I don't know what the conclusions of law should be based on these findings. I make them now because now the matter is fresher in my mind

and now I have in mind the appearance of the witnesses as they testified and believe that I can make better findings at this time than I could if I waited for a transcript and read what you had to offer. As I say, by this I don't preclude either of you from pointing out what either of you feel—wherein either of you feel that I have made findings not supported by the evidence. To the extent that any of this is based on contradictory evidence, I think that I have considered and probably the matter is fresher in my mind now than it will be later, when you might attempt to persuade me to the contrary. . . .

Mr. Shamberg: Did Your Honor make a finding or would it be appropriate to request a finding on whether or not the agent ever told the plaintiff or his wife when the policy terminated?

The Court: Yes, I made a finding.

Mr. Eager: Four days.

The Court: Yes, four days." (App. pp. 166-170).

SUPPLEMENTAL STATEMENT OF FACTS

Unfortunately we find it necessary to supplement the petitioner's "Statement of Facts" (Pet. pp. 5-12). Both the T-18 and T-20 policy forms are approved by the Insurance Departments of Kansas, Missouri and elsewhere. Missouri's Insurance Department regulations were exclusively applicable at the Municipal Airport (App. 137). The two airport booths sold 1,291 of the T-18 forms and 1,171 T-20's from January 16, 1963 to January 31, 1963 (App. 136) These figures do not include any of the T-20 vending machine sales. There is no evidence that the commission rate was any higher on the T-18 than on the T-20 (App. 139).

On direct examination Rev. Russell testified that his family walked up to the north counter and, upon being asked

by sales clerk Miss Fletcher if she could help them, he replied, "Yes, we want flight insurance, insurance coverage on my wife who is going to Lubbock and return" (App. 64). However, later during cross-examination he admitted that he was "really not sure" that he had ever used the word "flight" but instead probably only said, "I want insurance covering a round trip to Lubbock for my wife" (App. 90). Mrs. Russell had no other accident insurance of any kind (App. 92).

Miss Fletcher next brought out an application pad and asked either how long Mrs. Russell would be gone, or when she would return to Kansas City, at which point the insured wife, turning toward her husband, remarked in a normal speaking voice, "Three days. Do you think we can make it back in three days?" (App. 66). Petitioner promptly cautioned her, "No, you better allow yourself more th... that", and suggested that she should instead plan on being gone for four days (App. 66, 83, 98); he "assumed" that the sales clerk understood this remark was made in answer to her previous question (App. 84). Russell is *uncertain* whether Miss Fletcher thereupon audibly counted off: "Friday, Saturday, Sunday and Monday" (App. 92).

Petitioner additionally conceded (App. 84):

> "Q. Of course, you can't remember everything that happened there, really, can you?
>
> A. No, we were emotionally disturbed.
>
> Q. And actually there may have been something else said that you don't recall, couldn't there?
>
> A. Could be possible."

Although Miss Fletcher does not specifically recall this incident (App. 141), she described her usual selling procedure as (App. 154):

> "First we ask them how many days they are going to be gone and after their answer we either count it out or mark it on the calendar and then we say we have the two policies, the flight, and this is our newer policy that gives you double coverage in the air and continued coverage on your trip, and then we have our rate card that we show them the rates and—have to recount the days and if it is—well, on this one, like four days . . ."

She says she always extends T-18 policy coverage on into the calendar day *following the day* upon which the customer plans to complete his trip, viz., since on Friday Mrs. Russell planned to return in four days or on Monday, a four day T-18 policy would insure her throughout all of Monday and on into Tuesday (App. 156). Miss Fletcher did not "make a mistake on this occasion" (App. 159).

Mrs. Edwards, respondent's airport manager, explained that Miss Fletcher was instructed to tell customers (App. 45-6):

> "A. We first ask them how many days was he going to be gone, and then he would tell us maybe three days, he was leaving today, which is Thursday, we would say Thursday, Friday, 'Will you be returning Saturday,' and he would say, 'Yes,' and we will tell the customer we have two policies, the flight and then this policy gives you double coverage to your flight and continuous coverage during your trip.
>
> Q. You then tell the customer you have two policies?
>
> A. We tell them we have two policies first.
>
> Q. What policies, do you then tell him what the policies are?
>
> A. We tell him we have two policies, the flight and this policy which gives you double flight coverage."

The customer is always given "a choice of the policy he wants" (App. 46, 48, 51). At his pre-trial deposition,

Rev. Russell could recall *no* difference between his earlier air trip policies and this one (App. 95-6) except for the amount.

Mrs. Russell always planned on returning to Kansas City as quickly as possible after the Lubbock, Texas, funeral (App. 123, 125). When she was first telephoned on Thursday, January 24, 1963, George Rainwater's funeral had not been scheduled because his son Bert, who was in the military service in England, had not yet been reached (App. 115, 122-3). Richard Russell finally telephoned Bert's commanding officer in England and learned that bad weather had unexpectedly grounded Bert's flight until Sunday (App. 108-9). On Monday the funeral was finally set up for 10:00 A.M. on Tuesday (App. 111, 112, 120-1). Bert didn't arrive in Texas until Tuesday morning, barely in time for the funeral (App. 121). Again on deposition, Rev. Russell admitted that the funeral had been "postponed" (App. 89). Except for this delay the funeral, according to undisputed custom, would have been held on Saturday or Monday (App. 84-5, 125).

Mr. McNabb received the amount of coverage for which he asked, "nothing was forced on me", and he doesn't know which type of policy he actually received (App. 132-3). There is no evidence that McNabb was at the sales counter with the Russells (cf. Pet. pg. 19). In fact he said (R. 384):

> "Q. Do you remember anybody else?
>
> A. There were people all around, but nobody talking to her that I recall.
>
> Q. Do you remember anyone else buying a policy at the same time or while you were there?
>
> A. Not while I was there, no."

ARGUMENT

The Decision Of The Court Of Appeals Is Not Contrary To Local Law, Was Rendered In The Usual Course Of Judicial Proceedings, And Concerns A Narrow And Unusual Aspect Of Insurance Law.

No federal question or state statute is involved. Petitioner tacitly concedes that this is an open question of local law.[1] The question decided is more fairly described by the Court of Appeals as (Pet. pg. A2):

> "In more austere terms the main issue presented for decision is whether the Assured is entitled to reformation of a general accident flight insurance policy purchased at Insurer's sales booth in the lobby of an airport. The District Court reformed the contract and awarded plaintiff $20,000. We hold that under the *unusual fact situation of this case* the insurance policy should not have been reformed and the decision of the District Court must be reversed." (Our emphasis).

And, contrary to the Petition at page 5, it is plain to us that the Circuit Court of Appeals did not reverse ". . . on the ground that the insurer had no duty to explain to the assured the significant differences in the types of coverage it offered for sale *regardless of the circumstances of the transaction.*" Indeed, we suggest that the Court of Appeals imposes a duty upon respondent but thereafter rules that said duty was not violated in this unique factual situation. The District Court kept this case under advisement from November 24, 1964 when the trial was concluded (App. 30) until April 6, 1966 (App. 27) when its memorandum order, findings of fact and conclusions of law were filed. This 16 1/2 month delay can hardly justify the statement

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1. Thus Circuit Judge Brown footnoted (Pet. pg. A9): "15. And neither party disagrees that this is a case of first impression." Similarly, District Judge Stanley commented (Pet. pg. A21): "No cases have been found, or cited, which are directly in point."

that the case gave ". . . no difficulty whatsoever" to the District Court as petitioner now suggests (Pet. pg. 15).

All concerned agree that the policy expired by its clear and unambiguous terms some 12 hours before Mrs. Russell's death and, therefore, the only meritorious issue is whether the T-18 policy should be reformed into a T-20 policy so as to extend coverage throughout the Lubbock to Kansas City return flight. Abundant Kansas case authorities hold that reformation may be granted only upon a clear, satisfactory and convincing standard of proof which far outweighs the usual preponderance, see *Skelton* v. *Federal Surety Co.*, 8 Cir. 1926, 15 F.2d 756, 757, *Columbian National Life Insurance Co.* v. *Black*, 10 Cir. 1929, 35 F.2d 571, 573, and *Shell Petroleum Corp.* v. *Corn*, 10 Cir. 1932, 54 F.2d 766, 769.

The Kansas Supreme Court has held, *Bodwell* v. *Heaton & Co.*, 40 Kan. 36, 39-40, 18 Pac. 901, 902-3:

> "We understand the rule to be in actions to reform written instruments on the ground of mutual mistake, that the evidence must be clear and convincing when, as in this case, it is *parol*. It is not enough that it shows a probability of mistake, but there must be a *moral certainty* of it; in other words, it must be established beyond a reasonable doubt. Of course this rule applies when the correction is sought to be made on the strength of parol testimony alone . . ." (Emphasis ours)

This rule of proof beyond a reasonable doubt is consistently followed in Kansas, *Kratz* v. *Padfield*, (1922), 111 Kan. 396, 397, 207 Pac. 776, 777; *Schaefer* v. *Mills*, (1904), 69 Kan. 25, 27, 76 Pac. 436; *Kansas Amusement Co.* v. *Maryland Casualty Co.*, (1928), 126 Kan. 354, 359, 267 Pac. 968, 970. "A high order of proof" is required to "convince or satisfy the mind of the trial court . . .", *Algeo* v. *Employers' Indemnity Corp.*, (1925), 119 Kan. 186, 189, 237

Pac. 879, 880. And the same exacting standard applies to cases of reformation for a unilateral mistake accompanied by inequitable conduct or fraud as well as to the more frequent mutual mistake situations, *Federal Land Bank of Wichita* v. *Bailey,* (1943), 156 Kan. 464, 469, 134 P.2d 409, 413; *Jones* v. *Crowell,* (1948), 164 Kan. 261, 264, 35 F.2d 573.

The real "mistake" here is not in the policy term but in the unexpected delay in holding George Rainwater's funeral. He died at 6:00 A.M. on Thursday (App. 113) and, under the admitted custom, his last rites should have been on Saturday or even Monday morning (App. 84-5, 125). Mrs. Russell was undoubtedly thinking of this when she first answered Miss Fletcher with, "Three days" (App. 66), and similarly the lack of any information from nephew Bert, or possibly the intervening Sunday (App. 85), thereupon prompted petitioner himself to warn her to add a fourth day. In all events, the issued T-18 policy effectively, correctly and candidly insured Mrs. Russell for 12 hours (i.e., from an assumed Kansas City Continental Airlines arrival at 10:45 P.M. on Monday, January 28 on up to policy expiry at 11:00 A.M. on Tuesday, January 29) past her *latest* expected return.

Miss Fletcher did not make any mistake (App. 159). She always understood that the T-18 policy supplied the requested Tuesday coverage in full accord with the intent of all concerned. Under such circumstances reformation to extend the insured term does not lie, *Kansas Amusement Co.* case, *supra,* 126 Kan. 358, 267 Pac. 970. The guide lines on reformation in Kansas are set out in *Waddle* v. *Bird,* 122 Kan. 716, 719, 253 Pac. 576, 577, as:

> "The remedy of reformation may be invoked to ascertain and enforce a contract actually made, but it

> can never be employed to make a new contract nor to supply terms upon which the minds of the parties never met."

Also consider *Bailey* v. *Talbert,* (1956), 179 Kan. 169, 176, 294 P.2d 220, 225-26.

This T-18 policy which insured Mrs. Russell for four days as she requested is indistinguishable from leasing agent Kirkbride's mistaken-but-intended lease in *Russell* v. *Shell Petroleum Corp.,* 10 Cir. 1933, 66 F.2d 864, where at l.c. 865-67:

> ". . . As far as Kirkbride was concerned, the lease contract evidenced exactly what he intended . . . . In other words, a mistake as to facts extrinsic to the oral negotiations and the contract led Kirkbride to make a contract which he would not have entered into had he understood the true facts, but the contract as written was exactly as he intended it to be; it expressed the very terms he intended.
>
> * * * *
>
> "To justify reformation on the ground of mistake, the mistake must have been made in the drawing of the instrument and not in the making of the contract which it evidences. . . . . A mistake as to the existing situation, which leads either one or both of the parties to enter into a contract which they would not have entered into had they been apprised of the actual facts, will not justify reformation. It is not what the parties would have intended if they had known better, but what did they intend at the time, informed as they were."

This is the Kansas law! In the *Jones* case, *supra,* 164 Kan. 266, 188 P.2d 912, reformation was refused because the sellers were already aware that a clause about income taxes was omitted from the purchase contract when they executed it. On this the Kansas Supreme Court said:

> ". . . In that situation, since it contains everything the parties intended its provisions should include on the date of its execution, there is nothing about the contract to reform."

In order to reform, the inaccurately recorded "antecedent agreement" must first be established by the foregoing high standard of proof. *Shell Petroleum Corp.* case, *supra,* 54 F.2d 769, and *Columbian National Life Insurance Co.* case, *supra,* 35 F.2d 573. *C. S. Foreman Co.* v. *Great Lakes Pipe Line Co.,* 8 Cir. 1960, 274 F.2d 61, 65 reminds us:

> " 'The rule that must be applied in these cases is that the mistake to be corrected must have been made in drawing the instrument, and not in making the contract out of which it grew. . . .' "

Furthermore, we can appraise this situation only as it appeared to the parties at 11:00 A.M. on Friday, January 25, 1963. When we do so the Russells' erroneous belief that Mrs. Russell would return home no later than on Monday becomes a "mere mistake in prophecy, opinion or in belief relative to an uncertain event . . ." for which equity does not reform, *McMillin* v. *Farmers & Bankers Life Insurance Co.,* (1949), 167 Kan. 502, 507, 206 P.2d 1061, 1065; *Tucker* v. *Atchison, Topeka & Santa Fe Ry. Co.,* (1926), 120 Kan. 244, 247, 243 Pac. 269, 271; *Conway* v. *Conway,* (1931), 133 Kan. 148, 151, 298 Pac. 744, 746.

To obtain equity, petitioner "must stand upon some equity superior" to that of respondent, *Conaway* v. *Gore,* (1879), 21 Kan. 725. In this regard, the readily visible "Term of Coverage—4 Days" on the application must have: (1) actually disclosed Tuesday's expiry which was thereupon assented to by Mrs. Russell; or (2) raised an obvious red flag; or (3) been unimportant because the Russells had already been told about the termination on Tuesday by

Miss Fletcher; or (4) been ignored. In *any* one of these events no equitable relief should be granted in Kansas!

Reformation of an accident insurance policy was similarly refused in the *Algeo* case, *supra,* 119 Kan. 187, 237 Pac. 879, even though the policyholder, like the Russells, had not read his contract, instead relying on the agent's oral assurance that it was identical to an earlier policy. The Kansas Supreme Court thereupon observed, "There were marked differences in the policies, and some of these were plain, important and easily discerned." The failure to read an accessible contract can bar equity relief in Kansas, see *Cox* v. *Pabst Brewing Co.,* 10 Cir. 1942, 128 F.2d 468, 471. Still under Kansas law, in *Great Western Manufacturing Co.* v. *Adams,* 8 Cir. 1910, 176 F. 325, 327, we find:

> "Courts of equity will not relieve parties from the consequences of their own folly or assist them when their condition is attributable to a failure to exercise ordinary care for their own protection."

The Court of Appeals must ascertain the substantive law for itself, *Burgess* v. *Montgomery Ward and Co., Inc.,* 10 Cir. 1959, 264 F.2d 495, 497. FRCP 52(a) does not require it ". . . to give any specific weight to the trial court's conclusions of law, as it yet remains the duty of the appellate court to decide whether the correct rule of law has been applied to the facts found", *Campana Corp.* v. *Harrison,* 7 Cir. 1940, 114 F.2d 400, 406; *Himmel Bros. Co.* v. *Serrick Corp.,* 7 Cir. 1941, 122 F.2d 740, 742; 5 Moore's *Federal Practice,* Sec. 52.03[2], pp. 2630-1. That this result is not incompatible with Kansas law, consider *Goforth* v. *Franklin Life Insurance Co.,* (1969), 202 Kan. 413, 449 P.2d 477, in which recent case policy reformation was also refused after the risk was held to be excluded from insurance coverage.

As seen, this petitioner seeks certiorari ". . . merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 US 175, 178, 82 L. ed. 1273, 1275, 58 S. Ct. 849 (1938). This consideration becomes even more persuasive against certiorari in a non-jury case. *Crumady* v. *Joachim Hendrik Fisser*, 358 US 423, 429, 3 L. ed. 2d 413, 418, 79 S. Ct. 445 (1959). We have a private dispute which breeds no "real and embarrassing conflict of opinion and authority between the circuit courts of appeal," *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 US 498, 502, 95 L. ed. 479, 482, 71 S. Ct. 453 (1951). The latter case further reminds us, 340 US 503, 95 L. ed. 482-3:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."

The ancient remedy of equity reformation is mainly of academic, intellectual or episodic interest, *Rice* v. *Sioux City Memorial Park Cemetery*, 349 US 70, 74, 99 L. ed. 897, 901, 75 S. Ct. 614 (1955), particularly under these non-recurring circumstances, viz., Mrs. Russell's initial and corrected replies to Miss Fletcher's question, Mrs. Russell slowly signing her name on the application in plain juxtaposition to "Term of Coverage-4 Days", and the unexpected delay of the Rainwater funeral because of bad flying weather in England, all as framed in an equity suit for reformation of a plainly worded policy. *Carter* v. *Atlanta & S.A.B.R. Co.*, 338 US 430, 438-9, 94 L. ed. 236, 243, 70 S. Ct. 226 (1949).

CONCLUSION

The Court of Appeals having painstakingly construed, determined and logically applied local law to unique facts in a manner which does not conflict with any decisions in Kansas or elsewhere, and none of the other policy considerations described in Supreme Court Rule 19 here existing, the petition for writ of certiorari should be denied.

Respectfully submitted,

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